STATE OF MICHIGAN

COURT OF APPEALS

DOROTHY TIEPPO,

Plaintiff-Appellant,

v

JENNIFER MARIE SCHNEIDER and ROBERT DOLE TOTTEN III,

Defendants-Appellees.

UNPUBLISHED
December 28, 2004

No. 251547
Wayne Circuit Court
LC No. 00-001419-DC

Before: Zahra, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

In this custody action, plaintiff appeals as of right the trial court's[1] order of dismissal. We affirm the trial court's findings that plaintiff may not enforce a visitation order entered in this action, but for different reasons than that stated by the trial court. We also remand for further proceedings.

I

This action involves the custody of the minor child, Shana Schneider,[2] who was born out of wedlock to defendants on February 27, 1997. Plaintiff is defendant Jennifer Schneider's (Schneider) mother and the minor child's maternal grandmother. When the minor child was born, Schneider was in high school and lived with plaintiff. On October 2, 1997, plaintiff was appointed full guardian of the minor child by the Wayne County Probate Court (Probate Court).[3]

On January 14, 2000, plaintiff, in her capacity as legal guardian, filed a complaint in the trial court seeking sole legal and physical custody of the minor child and child support. By ex parte interim order, plaintiff was granted legal and physical custody of the minor child, while Schneider was granted reasonable parenting time and ordered to pay weekly child support. The

[1] "Trial court" refers to the Wayne County Circuit Court.

[2] The minor child's name has subsequently been changed to Shana Totten.

[3] *In the Matter of Shana Marie Schneider,* Wayne County Probate Court, No. 97-580064-GM.

Friend of the Court (FOC) recommended (1) that plaintiff and Schneider be awarded joint legal custody with physical custody awarded to plaintiff until a psychological evaluation was completed, and (2) that Schneider pay weekly child support.[4]

Apparently, objections were filed to the FOC recommendation and the case was reassigned to the probate court judge who presided over the guardianship proceedings so that a custody hearing could be held. See MCL 600.225. Following the custody hearing, on October 9, 2002, the probate court, acting as a circuit court, issued an opinion finding that plaintiff had failed to show that custody with plaintiff was in the minor child's best interests, and awarding defendants sole legal and physical custody. The probate court further ordered the creation and implementation of a reintegration plan so that the transfer of custody of the minor child would occur over a six week time frame, and that plaintiff's visitation with the minor child at the end of the six week transition would be at the defendants' discretion. The probate court also ordered that effective with the change of custody defendant's child support obligation was terminated except as to any arrearages, and that plaintiff's full guardianship would be terminated.

On October 28, 2002, the probate court modified its order granting custody to defendants by extending plaintiff's status as full guardian until November 20, 2002. On October 29, 2002, plaintiff filed a motion for a new trial, asserting that new evidence and the probate court's "selective consideration of the evidence" warranted a new trial. On the date plaintiff's motion for new trial was scheduled for hearing by the probate court, the parties announced they had reached an agreement. As stated on the record, the agreement provided that plaintiff's motions for new trial and defendants' request for attorney fees as prevailing party would be dismissed, that plaintiff would withdraw claims of child support arrearages allegedly owed by Totten and forego the reimbursement of fees she incurred attempting to establish Totten's paternity, that the full guardianship of the minor child would "be converted to a limited guardianship for the purposes of health care and school through June 30, 2003," and that the reintegration plan entered in the probate court's order of October 28, 2002 (which provided visitation between the minor child and plaintiff and set the stage for an attempted smooth residence transition for the minor child from plaintiff's home to defendants' home) would be extended through June 30, 2003, or until such time defendants' anticipated change of domicile occurred. The parties also agreed that commencing June 30, 2003 through 2008, plaintiff would have four weeks of summer visitation annually, alternating spring and winter break visitation, and a specified weekend visitation contingent on the minor child residing within 150 miles of plaintiff's residence, and that contact between plaintiff and the minor child after 2008 was not governed by this agreement.

The probate court directed the filing of a petition to modify the guardianship in the probate court action, since only a parent could seek a limited guardianship under the applicable

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[4] Defendants initially denied defendant Robert Totten III's (Totten) paternity, and therefore Totten was not named as a defendant when this action was filed. After the action was filed, however, plaintiff sought to have Totten's paternity established definitively. When it was determined that Totten was the minor child's father, he was added as a named defendant to this action.

statute. The probate court further directed that the settlement in the custody action would constitute the required limited guardianship placement plan in the probate court action. Significantly, the probate court made no specific order regarding custody of the minor child, and made no finding that the settlement agreed to by the parties was in the child's best interests.

The parties acknowledged their approval of the terms of the proposed agreement in open court, and plaintiff's counsel agreed to prepare proposed orders reflecting the terms agreed to on the record. The probate court announced that plaintiff's full guardianship status would remain in effect until the proposed orders, signed by all parties to acknowledge their consent, were filed with the court. For reasons not pertinent to this appeal, the proposed orders were not drafted for defendants' review and consent within twenty-one days. In the interim, defendants and plaintiff had several disputes concerning the implementation of the "agreed to" visitation schedule, such that when the proposed orders were eventually drafted and presented to defendants for their acquiescence, defendants would not sign the proposed orders. Plaintiff filed a motion for entry of an order regarding guardianship, reintegration and visitation under MCR 2.602(B)(3), defendants filed objections to the proposed order, and the matter was scheduled for a hearing before the probate court on January 15, 2003.

At the hearing, Totten told the probate court that he was no longer willing to sign the proposed order because he was not "willing to sign over any of [his] parental rights to [plaintiff] ever." Schneider expressed her continued agreement with the terms of the proposed orders "as long as [plaintiff did] not continue to hang [the fact that she has a] guardianship over [Schneider's] head." In addition, both defendants expressed concerns about the manner in which the proposed visitation schedule was being implemented. Nevertheless, the probate court entered the proposed order regarding guardianship, reintegration and visitation on the basis that both defendants had agreed to the terms of the proposed order in open court at the prior hearing.

On July 17, 2003, the probate court held a hearing concerning additional visitation disputes between the parties. At the conclusion of the hearing, the probate court ordered make-up visitation in favor of plaintiff, established a revised schedule for future visitation between plaintiff and the minor child, and further stated to the parties:

> . . . . [A]t this point I believe that this really concludes as a follow-up, and I hope that it does, the December 1[8], 2002 order. This came back to me because there was a guardianship in place, [plaintiff] filed a complaint for custody and that's why it was kicked back to me for the family court issue. Now that the guardianship is terminated effective June 30, 2003 - - and I did agree to hear this even though technically I would not because the guardianship terminated, I thought since obviously I had a history with the family and understood what was happening from these orders and the complexities of the relationships, I agreed to hear it.
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> But after my entry of the order following what you're going to submit to me, I will no longer have the authority as a probate judge sitting as a circuit court judge to hear this. So any further petitions that may come in regards to any of this, you need to file with the Wayne County Circuit Court, that judge may still ask to have it deferred to me, but since there's a [sic] guardianship. I don't know what the Supreme Court will do in regards to that request, but I will not

> automatically hear that because at least at this point I don't believe I have authority to hear anything beyond this, just so you know that technicality.

Plaintiff submitted a proposed order under MCR 2.602,[5] and on August 26, 2003, defendants filed formal objections to the proposed order and a "Motion to Terminate Grandparent Visitation." Defendants' motion asserted that plaintiff lacked standing to seek visitation with the minor child, that defendants' due process rights would be violated by the court granting plaintiff visitation with the minor child, and that it was in the minor child's best interests that plaintiff's visitation with the minor child be terminated. Plaintiff opposed the motion, asserting that defendants' agreement in open court to plaintiff's visitation with the minor child, and to other terms as specified in the January 15, 2003, order regarding guardianship, reintegration and visitation, was a binding agreement absent a showing of fraud or duress, and that because defendants had made no such showing of fraud or duress, the consent agreement should be enforced. On September 5, 2003, the trial court held a hearing on defendants' motion to terminate grandparent visitation and granted the motion, finding that irrespective of the prior visitation orders, plaintiff lacked any standing to proceed in this custody action once the limited guardianship expired and the guardianship proceedings were terminated. This appeal ensued.[6]

II

This Court reviews de novo the issue whether a trial court has subject-matter jurisdiction. *Atchison v Atchison*, 256 Mich App 531, 534; 664 NW2d 249 (2003). Similarly, whether a party has standing to bring an action involves a question of law that is reviewed de novo. *In re KH*, 469 Mich 621, 627-628; 677 NW2d 800 (2004). Issues of statutory interpretation are reviewed de novo. *Atchison, supra* at 534-535. "The primary goal of statutory interpretation is to give effect to the intent of the Legislature. This determination is accomplished by examining the plain language of the statute itself. If the statutory language is unambiguous, appellate courts presume that the Legislature intended the meaning plainly expressed and further judicial construction is neither permitted nor required." *Id.* at 535 (internal citations omitted). On the other hand, statutory language is deemed ambiguous if reasonable minds could differ with regard to its meaning, i.e., the language is susceptible to more than one interpretation. *In re MCI*, 460 Mich 396, 411; 596 NW2d 164 (1999). Where statutory language is ambiguous, judicial construction is permitted. *Deschaine v St Germain*, 256 Mich App 665, 669; 671 NW2d 79 (2003). Questions of court rule interpretation are also reviewed de novo. *People v Petit*, 466 Mich 624, 627; 648 NW2d 193 (2002). This Court's review of a visitation order is generally de novo; however, this Court will not reverse the order unless the trial court made findings of facts against the great weight of the evidence, committed a palpable abuse of discretion, or committed a clear legal error. *Deal v Deal*, 197 Mich App 739, 741; 496 NW2d 403 (1993) (citations

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[5] The docket entries in this case do not specifically reflect the date that this proposed order was filed with the clerk.

[6] Because defendants' motion to terminate visitation was granted, no hearing was held on plaintiff's motion to enter the proposed order to reflect the probate court's rulings regarding visitation during the July 17, 2003, hearing.

omitted). A trial court's decision whether to set aside a consent judgment is reviewed for an abuse of discretion. *Vestevich v West Bloomfield Twp*, 245 Mich App 759, 763; 630 NW2d 646 (2001).

III

Plaintiff first asserts that the trial court erred by finding that she lacked standing to enforce the visitation and other provisions of the January 15, 2003 order. We agree. "In order to have standing, a party must have a legally protected interest that is in jeopardy of being adversely affected." *In re Foster*, 226 Mich App 348, 358; 573 NW2d 324 (1997) (citation omitted). MCL 722.26b provides in relevant part:

> (1) Except as otherwise provided in subsection (2), a guardian or limited guardian of a child has standing to bring an action for custody of the child as provided in this act.
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> (2) A limited guardian of a child does not have standing to bring an action for custody of the child if the parent or parents of the child have substantially complied with a limited guardianship placement plan regarding the child entered into as required by section 5205 of the estates and protected individuals code, 1998 PA 386, MCL 700.5205, or section 424a of former 1978 PA 642.
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> (3) If the circuit court does not have prior continuing jurisdiction over the child, a child custody action brought by a guardian or limited guardian of the child shall be filed in the circuit court in the county in which the probate court appointed the guardian.
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> (4) Upon the filing of a child custody action brought by a child's guardian or limited guardian, guardianship proceedings concerning that child in the probate court are stayed until disposition of the child custody action. A probate court order concerning the guardianship of the child continues in force until superseded by a circuit court order. If the circuit court awards custody of the child, it shall send a copy of the judgment or order of disposition to the probate court in the county that appointed the child's guardian or limited guardian.

Plaintiff clearly had standing to bring this custody action while she was the minor child's guardian. Defendants' claim, that plaintiff can not bring an action for custody if she does not hold guardianship status is technically correct, but this argument does not address the facts of this case. Here, plaintiff seeks to enforce an order of visitation entered in an existing custody action that was properly filed when plaintiff was the minor child's guardian. Nothing in the plain language of MCL 722.26b prohibits such an enforcement proceeding. Because plaintiff seeks to enforce orders in an existing custody action rather than bring a new custody action, the trial court erred by finding that plaintiff lacked standing in this case.

Plaintiff next asserts that because she has standing in this action, the trial court erred by not enforcing the visitation provisions of the January 15, 2003, order entered by the probate court. We disagree. As we previously noted, after hearing the evidence in the custody trial, the probate court found in favor of defendants and ordered that plaintiff's guardianship status would

be terminated. Thereafter, the probate court ordered that plaintiff's full guardianship would be converted to a limited guardianship and directed that the defendants file a petition seeking such conversion. However, a limited guardianship as referenced in MCL 722.26b is a creature of statute. *In re Ramon*, 208 Mich App 610, 614; 528 NW2d 831 (1995). MCL 700.5205, governing statutory limited guardianships, provides in relevant part:

> (2) A minor's parent or parents who desire to have the court appoint a limited guardian for that minor and the person or persons who desire to be appointed limited guardian for that minor must develop a limited guardianship placement plan. The parties must use a limited guardianship placement plan form prescribed by the state court administrator. A limited guardianship placement plan form must include a notice that informs a parent who is a party to the plan that substantial failure to comply with the plan without good cause may result in the termination of the parent's parental rights under chapter XIIA of 1939 PA 288, MCL 712A.1 to 712A.32. The proposed limited guardianship placement plan shall be attached to the petition requesting the court to appoint a limited guardian. The limited guardianship placement plan shall include provisions concerning all of the following:
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> (a) The reason the parent or parents are requesting the court to appoint a limited guardian for the minor.
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> (b) Parenting time and contact with the minor by his or her parent or parents sufficient to maintain a parent and child relationship.
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> (c) The duration of the limited guardianship.
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> (d) Financial support for the minor.
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> (e) Any other provisions that the parties agree to include in the plan.

Plaintiff presents no evidence that the limited guardianship status held by plaintiff in this case was created in compliance with the requirements of MCL 700.5205. Despite his agreement to the limited guardianship arrangement at the November 20, 2002, hearing, Totten stated forcefully on the record at the January 15, 2003, hearing that he was not willing to cede any of his parental rights to plaintiff, and made it clear that he had refused to sign any consent to this effect. In addition, rather than establishing a parenting time schedule between the minor child and the defendants as provided by the statute, the probate court's order establishes a parenting time schedule between the minor child and the plaintiff as limited guardian and implies without stating that the defendants remained the legal custodians of the minor child. Despite the label accorded to plaintiff's status by the probate court's order of January 15, 2003, we are forced to conclude that plaintiff was not a limited guardian within the meaning of MCL 700.5205. *In re Ramon*, supra at 616. Because the probate court's order granting plaintiff limited guardianship status did not comply with the requisite statutory requirements and plaintiff did not become a statutory limited guardian, plaintiff cannot rely on any legal rights based on that purported status. See *Ryan v Ryan*, 260 Mich App 315, 332; 677 NW2d 899 (2004), citing *Ford v Wagner*, 153 Mich App 466, 470; 395 NW2d 72 (1986) (legal rights do not accrue on the basis of a relationship that does not meet the statutory requirements).

Additionally, and perhaps most importantly, the probate court, in adopting a proposed settlement that left open the question of custody, made no finding that, in the face of its October 28, 2002, opinion that the child's best interests required that sole legal and physical custody be awarded to defendants and that visitation with the plaintiff should be at their discretion, the child's best interests were now served by granting extensive visitation between the plaintiff and the minor child through the year 2008. The probate court was required to make a finding regarding the child's best interests before entering an order based on this proposed settlement, *Harvey v Harvey*, 470 Mich 186, 192-193; 680 NW2d 835 (2004), and its failure to do so requires that we vacate its decision. *Id*. Generally, we would remand to the trial court so that determine the child's best interests and determine custody and parenting time on that basis. However, in the present case, because the full guardianship was terminated and plaintiff did not acquire her limited guardianship status in the manner provided by statute,[7] plaintiff assumed the status of a grandparent who, by virtue of compromise between the parties, enjoyed court-ordered visitation with her grandchild in exchange for providing the child with health insurance and continuity in her schooling. As a grandparent with no guardianship status at this time, plaintiff now has no basis upon which to seek or otherwise obtain court-ordered visitation with the minor child. *DeRose v DeRose*, 469 Mich 320, 333-334; 666 NW2d 636 (2003); *Johnson v White*, 261 Mich App 332, 344-345; 682 NW2d 505 (2004). Thus, we affirm the trial court's conclusion that plaintiff may not enforce any prior visitation orders entered in the custody proceeding. We remand to the trial court, however, to reinstate the custody action so that the trial court may determine whether, because the visitation provisions of the January 15, 2003, order cannot be enforced, there is any basis to set aside the remaining provisions of that order.

Affirmed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder

[7] There remains an open question whether, assuming plaintiff *had* been appointed limited guardian according to the requirements of the statute, the visitation provisions ordered because of plaintiff's status as limited guardian are subject to enforcement once the limited guardianship was terminated. We need not address that question today.